

NO. 89-249

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Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

ELAINE KENNA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ of Certiorari  
To The United States Court of Appeals  
For The Supreme Court of The  
State of New Jersey

**RESPONDENT'S BRIEF IN OPPOSITION**

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3098

## Question Presented for Review

1. Whether the Petitioner in this case was denied her Fourth, Fifth, Sixth and Fourteenth Amendment rights under the Constitution of the United States of America, by the state trial courts ruling that under the facts of this case, Petitioner is guilty of resisting arrest.



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The Respondent, the State of New Jersey,



respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the Supreme Court of New Jersey, denying certification, and of the Superior Court of New Jersey, Appellate Division, affirming petitioner's conviction.

### COUNTER-STATEMENT OF THE CASE

The testimony as to the events of September 1, 1986, established that petitioner purposely prevented Officer Brown from effecting a lawful arrest in violation of N.J.S.A. 2C:29-2.

At approximately 12:10 a.m., on September 1, 1986, Susan Kenna was being picked up at Newark Airport by her father, John Kenna, her mother, Dorothy Kenna, her two sisters, petitioner Elaine Kenna, and Leslie Kenna and petitioner's boyfriend, Michael Gallagher. As the family was about to leave the airport in their car, a woman named Barbara Smith started screaming at Susan Kenna because the Kenna's car was double parked next to Ms. Smith's car. At that point, Mr. Gallagher began to exchange words with Ms. Smith. Ms. Smith then called the police on her cellular telephone,

claiming she had been assaulted.

Soon after, Officer Peter Schillizzie of the Port Authority Police of New York and New Jersey, arrived at the scene. Officer Schillizzie asked Mr. Gallagher to get out of the car and tell him what happened, and to provide some identification. While speaking to Officer Schillizzie, Mr. Gallagher turned and grabbed Mr. Keprios, who was among the crowd of bystanders observing the incident. Observing this, Officer Schillizzie radioed in for backup, grabbed Mr. Gallagher, and informed him that he was under arrest. The two men went down to the ground as Officer Schillizzie attempted to handcuff Mr. Gallagher. While struggling with Mr. Gallagher, Officer Schillizzie was struck by petitioner. In particular, Officer Schillizzie saw petitioner grab him from

behind and strike the left side of his head. At that point, radio cars responded to the area, and Officer Douglas Brown came to Officer Schillizzie's aid, pulling petitioner off of Officer Schillizzie. As a result of petitioner's physical assault, Officer Schillizie sustained injuries to his ear and knee.

As Officer Brown pulled petitioner off of Officer Schillizzie, petitioner appeared to be enraged. Officer Brown proceeded to inform petitioner that she was under arrest. He then attempted to handcuff petitioner but petitioner continued to struggle, resisting efforts by Officer Brown to complete the arrest. It was only after the handcuffs were on her wrists that petitioner stopped her resistance. Officer Brown indicated on direct examination that he saw only petitioner on top of Officer Schillizzie.

He then identified petitioner in court.

On November 16 and 17, 1987, a trial was conducted before the Honorable Anthony J. Frasca, J.M.C. At the conclusion thereof, the municipal court found that petitioner was not guilty of Officer Schillizzie's charge of resisting arrest. The court also found that while petitioner was not guilty of assault against Officer Brown, petitioner was guilty of resisting arrest as to Officer Brown. Specifically, the court found that petitioner was "thrashing about" and "flailing her arms". It also found that petitioner's contact with Officer Brown constituted "touching and [im]permissive illegal contact." The court imposed a fine as to Count One of \$250, \$20 court costs, and \$30 Violent Crimes penalty,

totalling \$300.<sup>1</sup>

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<sup>1</sup> Respondent notes that Petitioner was initially arraigned before the Honorable Julio M. Fuentes, J.M.C., on September 3, 1986, where she pled not guilty to all charges. Petitioner subsequently appeared before Judge Fuentes on December 15, 1986, at which time she entered a retraxit plea of guilty to preventing a law enforcement officer from effecting a lawful arrest, and the second similar charge was merged therein. It was thereby agreed to drop the assault charge. On March 20, 1987, petitioner's motion to withdraw the guilty plea was granted by the Honorable Paul R. Daniele, J.M.C., and upon the conclusion of a trial conducted that day, petitioner was found guilty of interfering with Officer Schillizzie when he was attempting to arrest Mr. Gallagher. She was also found guilty of assaulting Officer Brown by hitting him, and guilty of interfering with the arrest by Officer Brown. These two latter charges were merged. Petitioner appealed the decision to the Superior Court, Law Division, on April 7, 1987 and a hearing date of April 7, 1987 was scheduled. That hearing never took place in as much as Petitioner received notice from the court that the transcript of the trial was unintelligible, and the case was being reversed and remanded to the municipal court for a new trial.

A petition for removal of the action to the Federal District Court was filed by Petitioner, and a hearing trial on that petition was held in the Federal District Court in Camden, New Jersey, before the Honorable Stanley S. Brotman U.S.D.J., on October 15, 1987. The petition was denied for lack of jurisdiction, and an appeal taken to the Third Circuit was to have been submitted to a panel to decide if the petition should be listed for possible summary action on the basis that Judge Brotman's decision was not a final order. Petitioner argued successfully and prevailed on that point, but later was not successful in her prayer that the briefing process go forward. The court ruled against Petitioner and no appeal was taken. The time in which such an appeal need be filed has now lapsed.

An appeal taken to the Superior Court of New Jersey, Law Division, was

heard by the Honorable Frances M. Cocchia, J.S.C., on June 22, 1988, and the court upheld the judgment of the Municipal Court in a decision rendered that day. The court noted that the municipal court judge had an opportunity to observe the witnesses, assess their credibility and make his findings. The court further added that it was a question of credibility, and there was sufficient testimony from Officer Brown to substantiate the charge. The court acknowledged as to credibility, that it must give due deference to the judge below who observed the witnesses, and it was not inconceivable that Officer Brown's testimony was accurate. Moreover, from her own testimony, the court indicated, there's no question petitioner knew she was under arrest. The Superior Court then found petitioner guilty of resisting



arrest.

On August 8, 1988, Petitioner filed a Notice of Appeal to the Superior Court, Appellate Division. In rejecting the numerous claims made by petitioner on appeal, the court stated that it found petitioner's claim to be without merit. Specifically, the court stated its recognition that its scope of review was different from that of the Law Division, which had to decide the case de novo, State v. Johnson, 42 N.J. 146, 160-163 (1964). The court stated that the Law Division judge clearly recognized her responsibility under Johnson to make a de novo determination as to petitioner's guilt or innocence, and that the judge reached independent conclusions based on the resolution of a credibility dispute. The court further noted that although the judge resolved the issue of credibility

by giving deference to the relevant views of the municipal court judge who initially tried the case, id. at 161, she nevertheless pointed to specific factors and testimony, independent of what the prosecutor suggested was contained in the record, to support her conclusions. Lastly, the Appellate Division expressed its satisfaction that the essence of the testimony was clear and sufficient to support petitioner's conviction, despite the "substantial number of 'indiscernible' omissions" in the transcript of the proceedings in the Newark Municipal Court. (Petitioner's Exhibit A-1.) Petitioner's Petition for Certification before the New Jersey Supreme Court was summarily denied on May 2, 1989 (Petitioner's Exhibit A-2), and her Petition for a Writ of Certiorari was docketed in this Court on August 1, 1989.

In this Court, petitioner incorrectly invokes the jurisdiction of this Court under 28 U.S.C. sec. 2254, the habeas corpus provision of the statute.

**REASONS FOR DENYING THE WRIT**

1. THE DECISION BY THE COURTS OF NEW JERSEY TURNED ON THE SPECIFIC FACTS OF THIS CASE AND IS DEVOID OF SUBSTANTIAL PRECEDENTIAL AUTHORITY.

The questions presented by the petitioner herein is devoid of the type of precedential significance which would suggest the propriety of a writ of certiorari. In reaching their determinations, the New Jersey courts did not decide a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals. Nor did the New Jersey courts decide an important question of federal law which has not been, but should be, settled by this court; or decided a federal question in a way in conflict with applicable decisions of this Court. Rather, the State courts' opinion, which is not published, applied the appropriate state caselaw and found that under the

facts herein, a violation of the resisting arrest statute had occurred. Specifically, the trial court's determination that petitioner's acts of "thrashing about" and "flailing her arms" constituted "touching and [im]permissive illegal contact", was more than substantiated by the record.

It is apparent that the decisions rendered by the state courts were fact-sensitive determinations devoid of precedential value. Hence, the petition does not present the kind of question of public importance which merits the granting of a writ of certiorari.

2. THE DECISION BY THE NEW JERSEY COURTS WAS CORRECT.

It is well established that the applicable standard for determining evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). This standard "gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw inferences from basic facts to ultimate facts." Id. at 319; Haymon v. Higgins, 846 F.2d 1145, 1146 (8th Cir. 1988). See also State v. Martinez, 97 N.J. 567, 571-572 (1984); State v. Mayberry, 52 N.J. 413, 436-437 (1968), cert. denied 393 U.S. 1043 (1969); State v. Martin, 213 N.J. Super. 426, 434 (App.

Div. 1986). Additionally, a court of appeals cannot second-guess a trial court's findings that depend on explicit or implicit credibility findings unless those findings are unsupported by the record, United States v. Gomez, 846 F.2d 557, 560-561 (9th Cir. 1988), and it is not the function of a reviewing federal court to reweigh evidence or determine issues of credibility. Haymon v. Higgins, 846 F.2d at 1146. Accord Wainwright v Sykes, 433 U.S. 72, 81 (1977) (a state decision resting on adequate foundation of state substantive law is immune from review in the federal courts).

In the case sub judice, petitioner was convicted of resisting arrest pursuant to N.J.S.A. 2C:29-2. That statute provides in pertinent part that "[a] person is guilty of a disorderly

persons offense if he purposely prevents a law enforcement officer from effecting a lawful arrest." The testimony adduced on behalf of the State of New Jersey amply demonstrates that petitioner is indeed guilty of the charge. Officer Douglas Brown specifically described how, upon arriving at the scene, he observed petitioner choking Officer Schillizzie, while Officer Schillizzie was in the process of putting handcuffs on Mr. Gallagher. Officer Brown then apparently pulled petitioner off Officer Schillizzie, at which time petitioner became "enraged". The Officer informed petitioner that she was under arrest and attempted to handcuff her, at which point petitioner continued her struggles and efforts at resistance. Petitioner ceased resisting only after the handcuffs were on her hands. The municipal court judge,



who had the opportunity to observe the witnesses' demeanor clearly found the testimony of the State's witnesses to be more credible than the testimony adduced on petitioner's behalf, and the judge properly ruled that petitioner's actions constituted a violation of the state statute. See Hartford Acc. Indem. Co. v. Sullivan, 846, F.2d 377, 384 (7th Cir. 1988) (mixed question of fact and law, such as whether facts add up to offense are questions of fact governed by the clearly erroneous rule on review); United States v. Caldwell, 820 F.2d 1395, 1401 n.5 (5th Cir. 1987) (when a district court's finding is based in part on its assessment of the credibility of witnesses, only in exceptional circumstances will a court of appeals depart from such assessment). The Superior Court, Law Division, and the

Superior Court, Appellate Division, also concurred in the trial court's findings, and the state courts decision is entitled to deference by this Court. Jackson v. Virginia, 443 U.S. at 323; Thomerson v. Lockhart, 835 F.2d 1257, 1259 (8th Cir. 1987); United States v. Randle, 815 F.2d 505 (8th Cir. 1987). Moreover, as noted by the Superior Court, Appellate Division, the unintelligible portions of the trial transcripts did not detract from the overall meaning of the testimony, and the State asserts that a careful perusal of the record below supports this conclusion.

In essence, the exclusive functions reserved for the trier of fact include (i) observation of the appearances and demeanor of the witnesses; (ii) appraisal of their credibility; (iii) determinations of the weight to be given

their testimony and drawing admissible inferences therefrom; and (iv) resolution of any conflicts in evidence and the reaching of ultimate conclusion of facts. United States v. Leach, 749 F.2d 592, 600 (10th Cir. 1984). Here, the State courts' decision rested on an adequate foundation of state substantive law and is thus immune from review in the federal courts. Wainwright v. Sykes, 433 U.S. at 81.

The State further submits that the remaining questions presented by petitioner on appeal are also meritless. First, with respect to petitioner's claim that the Superior Court, Appellate Division, was required to take judicial notice of petitioner's actions before the United States District Court for the District of New Jersey, as well as to notice the appeal of that decision to the

United States Courts of Appeals for the Third Circuit, the State notes that petitioner clearly abandoned her jurisdictional claim in the lower federal courts, and as such, is now procedurally barred from raising that claim in this Court. Moreover, the Superior Court, Appellate Division, was presented with the entire record of this case, and is presumed to have knowledge that petitioner did take her claim to the federal courts. The New Jersey court, despite this, still ruled that petitioner's claims were meritless, and this decision should be affirmed.

Second, with respect to petitioner's claim that her speedy trial right was violated, the State notes that prosecution in this matter commenced on Septmeber 3, 1986, when petitioner was arraigned in the municipal court. On

Decemer 15, 1986, she entered a retraxit plea of guilty to preventing a law enforcement officer from effecting a lawful arrest, and the second similar charge was merged therein. Subsequently petitioner appeared in court on March 20, 1987 to withdraw the guilty plea, and a trial was conducted that same day. Petitioner filed a petition for removal of the action to the Federal District Court and a hearing was held on October 15, 1987. Petitioner subsequently abandoned her petition, and filed an appeal to the Superior Court, Law Division. On June 22, 1988, petitioner's conviction was affirmed by the Law Division, and the Superior Court, Appellate Division, also affirmed the conviction in an unreported opinion filed on February 15, 1989. Her petition for certification was denied by the New

Jersey Supreme Court on May 2, 1989. The foregoing more than adequately refutes petitioner's claim that her right to a speedy trial was violated especially with regard to the institution of the second trial. Her arguments on this issue must therefore be rejected.

Petitioner's additional claim that she was improperly charged under N.J.S.A. 2C:29-2 with resisting the arrest of Officer Schillizzie as he attempted to arrest Mr. Gallagher is specious. This claim was dismissed by the trial court, which stated that petitioner was charged under the incorrect statutory provision. In light of this, petitioner's claim that the statute is vague is meritless, since, as the state court noted, petitioner's actions constituted obstructing the administration of law or hindering apprehension, offenses which are codified

in N.J.S.A. 2C:29-1 and N.J.S.A. 2C:29-3, and for which petitioner was not charged.

Lastly, petitioner's claim that she was denied the right to confront her accusers is devoid of merit. Officers Schillizzie and Brown, the officers involved in this incident, were clearly present at trial and did testify. These officers were subject to cross-examination by petitioner's attorney, and it is of no consequence that the officers' supervisors, who apparently determined the charges that were brought against petitioner, did not testify. The supervising officers had no first-hand knowledge of the crimes and their testimony would only have been hearsay under state and federal rules of evidence.

CONCLUSION

For the reasons stated above, Respondent, the State of New Jersey, respectfully requests that this Court deny the Petition for Certiorari to the United States Court of Appeals for the Supreme Court of the State of New Jersey.

Respectfully submitted,

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ESSEX COUNTY PROSECUTOR

GLENN D. GOLDBERG  
ASSISTANT PROSECUTOR

DATED: